IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/1901/2010-ST[SM]
[Arising out of Order-in-Appeal No. Commr./RPR/41/2010 dated 31.05.2010, passed by the Commissioner of Central Excise, Raipur]

M/s. Vikas Metalliks & Energy ltd. ....Appellant

Vs.

C.C.E, Raipur .....Respondent

Appearance:
Ms. Rinki Arora, Advocate for the Appellant
Sh. M.R. Sharma, DR for the Respondent

CORAM:
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 20.01.2017

Final Order No. 51915 /2017-CU(SM)

Per V. Padmanabhan

The present appeal has been filed against the order passed by the Commissioner Central Excise, Raipur dated 31.05.2010. The appellant have a plant for crushing and screening of iron ore lumps on job work basis for their clients. The appellants were to unload the iron ore lumps received from their clients in Railway wagons, load the same into the tippers, transport the lumps from railway siding to the crushers and thereafter load the processed and sized ore into trucks for dispatch to their clients. For the entire activity (the main activity of which is crushing and sizing of the iron ore lumps), the appellant charged a consolidated amount from their customers. They obtained service tax registration under Business Auxiliary Service under sub-clause 65(105)(zzb) readwith Section 65(19)(v) of the Finance Act, 1994. The appellants were paying service tax on the gross amount received by them for this activity, which, as mentioned above, comprised the crushing of iron ore and sizing and also included unloading the lumps at the railway siding, loading the same into their tippers, their transportation to the factory and thereafter loading the processed ore on to the trucks. The department issued a show cause notice dated 20th May 2009 to the appellant for recovery of allegedly wrongly taken Cenvat credit amounting to Rs. 71,83,811/- alongwith interest and also for imposition of penalty on them under Rule 15 of the Cenvat Credit Rules, 2004. In the impugned order dated 31.05.2010 passed by the Commissioner, the demand for recovery of wrongly availed Cenvat credit was restricted to Rs 31,70,330/- and the Cenvat credit on tippers was disallowed.

2. With the above background, heard Ms. Rinki Arora, ld. Advocate for the appellant as well as Shri M.R. Sharma, ld. DR for the respondent.

3. The ld. Counsel for the appellants submits as that out of the amount of Rs 31,70,330/-, an amount of Rs 13,57,912/- is in respect of credit availed on steel items such as MS Channel, H.R. Sheet, M.S. angles etc, which have been used for making supporting structure and hence, are not eligible for Cenvat credit.

The Counsel submits that cenvat credit is being allowed for structural items used in supporting structures for capital goods consistently by the Tribunal. She has cited the following decisions to allow such Cenvat credit:-

i. **Mundra ports & Special Economic Zone Ltd. Vs. C.C.E. & Cus. 2015 (39) S.T.R. 726 (Guj.).**
ii. **India Cements Ltd. Vs. CESTAT, Chennai 2015 (321) E.L.T. 209 (Mad.)**
iii. **M/s Manglam Cement Ltd Vs Commissioner of Central Excise, Jaipur 2017-TIOL-141-CESTAT-DEL.**
iv. **Ultratech Cement ltd Vs Commissioner of Central Excise and Service Tax, Jaipur-I 2017-TIOL-91-CESTAT-DEL.**

4. Cenvat credit amounting to Rs 18,12,418/- has been disallowed in respect of tippers. The ld. Commissioner has disallowed the same under Rule 2(a)(B) of the Cenvat credit Rules, 2004. The above rule allows Cenvat credit for motor vehicles under the category of Capital goods, when the same is used for providing debate services. Specified in clause Section 65(105)(f),(n),(o),(zr),(zzp), (zzt) and (zzw) of the Finance Act, 1994. Since, the appellant is registered under the category of Business Auxiliary Service (BAS) following under Section 65(105)(zzb), which does not find placed in Rule 2(a)(B), the Cenvat credit on tippers has been disallowed in the impugned order.

5. She submits that the activities undertaken by the appellant included unloading of iron ore lumps at the railway siding, arranging its transportation to the factory and loading of the crushed iron ore lumps into trucks and dispatching the same to the customers. She submits that the activities, when broken up, would be classifiable partly under "Cargo Handling Services" as well as partly under "Business Auxiliary Service". She further submits that in terms of the contract executed by the appellant with the respective customers, charges for the two activities are indicated separately. Both the services have been classified under Business Auxiliary Service, considering the same as a composite service and by resorting to classification as per Section 65 A (2) of the Finance Act, 1994.

She finally submits that since Cargo Handling Service is part of the composite service, for which the tippers are required for providing the service, the cenvat credit should be allowed.

6. Ld. DR reiterates the order of the ld. Commissioner. He further submits that the cenvat credit has been rightly disallowed. Since, the output service provided by the appellant is Business Auxiliary Service classifiable under Section 65(105)(zzb), which does not find place in the definition under Rule 2(a)(B), accordingly, the cenvat credit with reference to tippers has been rightly allowed.

7. He, however, agrees that the credit on structural items used for making support structure of capital goods has been allowed by Tribunal in the decisions cited by the ld. Advocate.

8. I find that the issue of Cenvat credit availed on supporting structures for capital goods stands allowed by the Tribunal in various decisions. Hence, the issue is no longer *res integra* and stands decided in favour of the appellants, in the case of M/s Lafarge India Ltd, decided by the Tribunal vide Final Order 53775/2016 dated 27.09.2016. The Hon'ble Tribunal held as follows:

> "15. We find that the controversy can be laid to rest by making a reference to the decision of the Apex Court in the case of CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd. -2010 (255) ELT 481(SC), wherein the Hon'ble Supreme Court has considered an identical issue of steel plates and MS channels used in the fabrication of chimney for diesel generating set. The credit stands allowed in the light of Rule 57Q of the erstwhile Central Excise Rules, 1944. In the said judgment, the Apex Court has referred to the "user test" evolved by the Apex Court in the case of CCE, Coimbatore vs. Jawahar Mills Ltd. -2001 (132) ELT 3 (SC), which is required to be satisfied to find out whether or not particular goods could be said to be capital goods. When we apply the "user test" to the case in hand, we find that the structural steel items have been used for the fabrication of support structures for capital goods. The appellants have argued that the various capital goods, such as, kiln, material handling conveyor system, furnace etc. cannot be suspended in mid air. They will need to be suitably supported to facilitate smooth functioning of such machines. It is obvious that the structural items have been suitably worked upon for this purpose. Accordingly, the goods fabricated, using such structurals, will have to be considered as parts of the relevant machines. The definition of 'Capital Goods' includes, components, spares and accessories of such capital goods. Accordingly, applying the "User Test" to the facts in hand, we have no hesitation in holding that the structural items used in the fabrication of support structures would fall within the ambit of 'Capital Goods' as contemplated under Rule 2(a) of the Cenvat Credit Rules, hence will be entitled to the Cenvat Credit".

> 8. In view of the ratio laid down in various decisions of this Tribunal, Hon'ble High Courts and the Hon'ble Supreme Court we find no merit in the impugned order. Accordingly, same is set aside, the appeal is allowed."

By following the above decision, I allow the benefit of Cenvat credit availed on M.S. Angles, H.R. Plates etc used for making support structures for capital goods.

9. The Second part of the dispute pertains to the Cenvat credit availed on tippers. The relevant Rule 2a (B) is reproduced below for ready reference:

> "2a…..
> B) Motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clause (f), (n), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act."

10. The above Rule allows credit for motor vehicles in respect of service provider providing the output service of "Cargo Handling" under 65(105)(zzb) but the Business Auxiliary Service classified under 65 (105)(zzb) has not been specified in the above Rule. For such reason, the credit has been disallowed in the impugned order.

11. The ld. Commissioner in the impugned order has discussed the issue as follows:

> "7.2.1.1 I find that the Noticee have taken the credit of duty paid on the goods namely "Front end RM charging machine" classifiable under Tariff Item No. 87060042 of the Central Excise Tariff. In this context, they have submitted that even if they are registered for providing the services of crushing of iron ore which falls under business auxiliary services, they are also undertaking the activities relating to unloading of iron ore lumps from railway wagon, loading into tippers, road transportation from railway sidings to their premises and loading of sized ore to truck for dispatch to customers which falls under 'cargo handling services'. Thus even though they have taken single registration under business auxiliary services they have been discharging service tax on the entire value of services including

> that of cargo handling. In view of the above, they claimed the credit on tippers under rule 2(a)(B) of the Cenvat Credit Rules, 2004.
> 7.2.1.3 I find that even if the Noticee are undertaking the activities relating to unloading of iron ore lumps from railway wagon, loading into tippers, road transportation from railway sidings to their premises and loading of sized ore to truck for dispatch to customers which falls under 'cargo handling services' in conjunction with crushing of iron ore, they are registered only for providing the services under the category of BAS which is classifiable under sub-clause (zzb) of clause 105 of Section 65 of the Finance Act, 1994".

12. Service tax stands paid by the appellant under the output service of "Business Auxiliary Service". However, the ld. Commissioner has noted that they have discharged the Service Tax on the entire value of services including the part which would be classifiable under "Cargo Handling Services". The ld. Counsel has also placed on record copies of work orders placed by the customers on the appellant, which specified both the activities of crushing of iron ores lumps as well as loading/ unloading of such lumps from the railway siding to the factory of the appellant as well as transporting the crushed ore to the customers.

13. From the above discussion, I am convinced that the service of cargo handling stands provided by the appellant. However, the Service Tax has been paid under BAS by considering the total service rendered by the appellant as a composite service, whose essential character is that of crushing of iron ore, which is an activity under BAS. Since, cargo handling is specified under the definition of capital goods, I am of the view that the appellant will be entitled to the cenvat credit claimed on tippers.

14. In view of the above, the appeal is allowed with consequent benefit.

[Dictated and Pronounced in the open court]

V. Padmanabhan
Member (Technical)

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